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No. 01-309

IN THE

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a/ KEITH GATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF MISSOURI, NEBRASKA, NEVADA, OKLAHOMA, UTAH, INDIANA, WEST VIRGINIA, MISSISSIPPI, LOUISIANA, HAWAII, PENNSYLVANIA, OREGON, CONNECTICUT, RHODE ISLAND, IDAHO, AND THE TERRITORY OF GUAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The Court has posed the following questions:

1. Whether state officials sued in their individual capacities under 42 U.S.C. § 1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a case presenting facts "materially similar" to those in the plaintiff's case.

2. Whether under the circumstances that must be taken as true at the summary judgment stage of this case, tying a prisoner to a "hitching post" violates "clearly established" constitutional rights for purposes of qualified immunity under 42 U.S.C. § 1983.

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STATEMENT OF INTEREST

Amici Curiae are the States of Missouri, Nebraska, Nevada, Oklahoma, Utah, Indiana, West Virginia, Mississippi, Louisiana, Hawaii, Pennsylvania, Oregon, Connecticut, Rhode Island, Idaho and the Territory of Guam (collectively, *Amici* or "*Amici* States"). They have a strong interest in this case, not so much for what it may portend for the constitutionality of Alabama's policy of using restraining bars to induce prison inmates to behave properly on their work details (a matter on which *Amici* take no position), but for its potential impact on the law of qualified immunity.

Collectively, *Amici* States employ hundreds of thousands of individuals. Each of them faces the risk of a lawsuit under 42 U.S.C. § 1983 seeking to hold him or her personally liable for action or, in some circumstances, inaction. Yet the vast majority of *Amici*'s employees are not lawyers or judges. Indeed, the vast majority have little, if any, experience with the legal system, much less with the construction of judicial opinions.

Accordingly, the central question in this case—the amount of "breathing space" afforded to public employees in construing and applying judicial decisions for purposes of qualified immunity—is of paramount importance to *Amici*. The less breathing space this Court affords, the narrower will be the scope of that immunity and, accordingly, the greater the potential for state employees to incur litigation costs and potential judgments under Section 1983. Given that most States not only indemnify their employees against such judgments, but also assume the costs of their defense, the financial costs of such litigation fall directly upon the States.

But the consequences to *Amici* do not end there. Like *Bivens* actions against federal employees, Section 1983 lawsuits undoubtedly deter some unlawful behavior. Nonetheless, unless such suits are constrained by appropriate

qualified immunity protection, they will make it more difficult to recruit and retain high-quality employees. As this Court has long recognized, moreover, such suits can lead to a number of other ills, including "the diversion of official energy from pressing public issues" and "dampen[ing] the ardor of all but the most resolute, or the most irresponsible [government officials] in the unflinching discharge of their duties." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (internal quotation omitted).

Accordingly, if not tightly controlled, such lawsuits can hamper the effectiveness of State programs in a variety of contexts. These unintended consequences may be felt not only in prisons, where the potential plaintiffs "have demonstrated a proclivity for antisocial, criminal, and violent conduct," *Cleavinger* v. *Saxner*, 474 U.S. 193, 203 (1985), but also in law enforcement, health and safety regulation, environmental protection, recreational programs, child protection and family welfare.

For all these reasons, *Amici* have a powerful interest in ensuring that the qualified immunity defense to Section 1983 liability remains robust, and that applicable legal standards give public officials ample breathing space in their interpretations of judicial decisions.

STATEMENT OF FACTS

To avoid burdening the Court with another recitation of the facts, *Amici* adopt the statement in respondents' brief.

SUMMARY OF ARGUMENT

1. The central issue in this case is how public officials, state or federal, can determine whether a particular legal principle derived from case law is established with sufficient clarity and particularity that it can be the basis for liability under Section 1983 or *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Eleventh Circuit's approach—which asks whether the facts of the case

relied upon are "materially similar" to the facts of the case at issue—provides the appropriate standard.

Indeed, this standard mirrors the standard this Court already applies in determining, on federal habeas review, whether a state-court decision is "contrary to clearly established law." As the Court has explained in its habeas jurisprudence, a state judge interpreting case law acts "contrary to clearly established federal law" when he "'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Penry* v. *Johnson*, 532 U.S. 782, 792 (2001) ("*Penry II*") (quoting *Williams* v. *Taylor*, 529 U.S. 362, 406 (2000)).

It would be inappropriate to hold public officials—especially lay state officials—to a higher level of interpretive accuracy in determining when federal law is "clearly established" than are state judges in the habeas context. First, in both cases, the policy rationale for giving officials ample breathing space is the same, namely, protecting the public. Second, although they face similar interpretive problems, state judges are, if anything, better equipped to reach the correct answer than are most lay employees. Judges have both the legal skills with which to discern the meaning of precedent and the advantage of setting the pace at which they make determinations, whereas most lay officials have little familiarity with legal principles and often are required to make snap judgments. Third, principles of comity and federalism also militate in favor of giving as much leeway to a state's lay officials in their efforts to discern the limits of federal law as the law affords to state judges on habeas review.

Like this Court's habeas jurisprudence, the Eleventh Circuit's "materially similar" approach also accords with this Court's qualified immunity precedent. As the Court recently reiterated, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be

clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001) (emphasis added). By itself, this statement suggests the need for a fairly tight similarity to the facts of the case relied upon as establishing the pertinent legal principle. But the Court did not stop there. It went on to say that the test is whether the case relied upon occurred "under facts not distinguishable in a fair way from the facts presented in the case at hand." *Id.* at 2157. To say that a case is "not distinguishable in a fair way" is to say, in essence, that the case is not "materially distinguishable," which in turn implies that the facts of the two cases are not "materially similar."

2. Even if the Court were to adopt a stricter standard of review in the qualified immunity context (which it should not), the decision below still should be affirmed. The contrary arguments advanced by petitioner and his *amici* for depriving the respondents of their qualified immunity ignore fundamental principles applicable in any lawsuit under Section 1983.

First, absent an allegation and proof of conspiracy (of which there is none here), state officials are amenable to suit and subject to liability under 42 U.S.C. § 1983 only for their own actions, and only on the basis of *reasonable* inferences from the summary judgment record. Here, the only challenged conduct fairly attributable to these prison guards, based on the summary judgment record, is that they either placed petitioner on the restraining bar or ordered him placed there. It is undisputed that they did so, moreover, pursuant to a state-wide prison regulation (Regulation 429) that requires other officers—those posted near the bar—to ensure that the inmate receives adequate food, water and bathroom breaks, and to given him an opportunity to return to work as soon as he indicates a willingness to do so.

Second, any determination of whether a particular case "clearly establishes" a constitutional right must take account of other pertinent authority, including regulations as well as

case law. *E.g.*, *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Here, petitioner relies primarily upon a 1974 circuit court decision indicating it would be unlawful to punish prisoners by handcuffing them to fences or prison cells for extended periods. Yet prison regulations subsequently issued by Alabama's governor and its highest correctional official not only condoned but directed the use of a restraining bar to encourage prison inmates to return to work in a cooperative spirit. And no fewer than six federal-court decisions between 1974 and the events at issue here held that the use of the restraining bar, or similar restraint, in such circumstances does not violate the Eighth Amendment.

Given all of this intervening authority, it cannot reasonably be concluded that petitioner enjoyed a "clearly established" federal right to avoid being attached to the bar when he refused to work or was disruptive to his work crew. Under any standard, it is inappropriate to subject state officials to suit when their conduct was fully consistent with the current state of the law.

ARGUMENT

This case gives the Court an opportunity to provide much-needed guidance to the lower federal and state courts on an issue that has bedeviled public employees—and their employers—ever since they became subject to liability under 42 U.S.C. § 1983 and *Bivens*, 403 U.S. 388 (1971). That issue is how they can determine whether a particular legal principle, derived from case law, is established with sufficient clarity that it can be the basis for liability in a real-world situation.

As explained below in Section I, the Eleventh Circuit's standard of requiring "materially similar" case law guidance, at least when the underlying mandate is not itself crystal clear, is the appropriate standard. Moreover, as explained in Section II, the proper application of this standard requires

attention to settled principles of vicarious liability and established summary judgment standards, as well as a recognition of the important role that administrative regulations and competing case law can play in determining whether a particular right has been "clearly established."

I. UNLESS A CONSTITUTIONAL PROVISION OR STATUTE ON ITS FACE ESTABLISHES THE UNLAWFULNESS OF THE CONDUCT AT ISSUE, PUBLIC OFFICIALS CAN BE DEPRIVED OF THEIR QUALIFIED IMMUNITY ONLY IF THE UNLAWFULNESS OF THAT CONDUCT IS "CLEARLY ESTABLISHED" BY A CONTROLLING, MATERIALLY SIMILAR CASE.

As this Court established 20 years ago, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). It is, however, a fact of public life that large interpretive gaps often exist between general statements in the constitutional and statutory text and the way in which those statements will be held to apply in a given context. See, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (qualified immunity analysis turns "upon the level of generality at which the relevant 'legal rule' is to be identified"). Accordingly, when a constitutional or statutory provision provides no clear instruction, or when the application of a straightforward provision is elusive in a given context, case law is especially important to set the parameters of these federal protections and to guide the officers' actions. See U.S. Br. 16-17.

Given that reality, the key question—and the principal question presented here—is how to decide when case law establishes a constitutional right with sufficient clarity as to "be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001), and thus to trigger personal liability. By what standard is this determination to be made?

This is not the first time this Court has addressed such an issue. In 1989, in the habeas corpus context, the Court held that a state-court decision could not be overturned on federal habeas review on the basis of a "new rule" of constitutional law. *Teague* v. *Lane*, 489 U.S. 288, 301 (1989). A few years later, Congress codified this principle in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which prohibits a federal court from granting a habeas petition on the basis of an alleged conflict with controlling case law unless the state court's decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Shortly thereafter, in *Williams* v. *Taylor* and unanimously in *Penry* v. *Johnson*, the Court held that the standard by which to determine whether a state-court decision is "'contrary to . . . clearly established Federal law'" is whether the state court "confronts facts that are *materially indistinguishable* from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams* v. *Taylor*, 529 U.S. 362, 404, 405 (2000) (omission in original) (emphasis added); *Penry* v. *Johnson*, 532 U.S. 782, 792 (2001) ("*Penry II*") (same).

Setting aside the fact that only a decision of this Court can have controlling effect in the habeas context,[1] the *Williams/Penry II* analysis provides an appropriate standard with which to answer the question presented in this case. That is, just as a state-court decision cannot be overturned on

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[1] The federal habeas statute expressly limits the range of "clearly established" law to that of this Court. 28 U.S.C. § 2254(d)(1); *Penry II*, 532 U.S. at 792; *Williams* v. *Taylor*, 529 U.S. 362, 405-06 (2000). By contrast, the Court has indicated that lay officers can be required to look beyond this Court's cases to "any cases of controlling authority" in the officer's jurisdiction, which "clearly established the rule on which [plaintiff] seek[s] to rely." *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999); *see also United States* v. *Lanier*, 520 U.S. 259, 268-69 (1997).

federal habeas review unless it decides a case differently than this Court has on a set of materially indistinguishable facts, so also a public official should be deprived of qualified immunity on the basis of case law only if his or her decision runs counter to a controlling case decided on materially indistinguishable facts.

As shown below, that is the essence of the Eleventh Circuit's approach. And it makes sense because it ensures that lay public officials—and especially state officials—will have as much "breathing space" in their interpretations of controlling case law as state judges receive in the habeas context. Moreover, unlike the approaches advocated by petitioner and his *amici* the ACLU, the Eleventh Circuit's approach is fully consistent with this Court's qualified immunity jurisprudence.

A. Public Employees Should Enjoy At Least As Much "Breathing Space" In Their Application Of Case Law As State-Court Judges Receive In Applying Case Law In Criminal Proceedings That Are Reviewed In Federal Habeas Actions.

It seems intuitively obvious that a public official with no legal training should receive at least as much leeway in her interpretation of case law as a state-court judge whose decision is being reviewed in a federal habeas proceeding. Not only is a judge better equipped to make such judgments, but the policy rationale for affording breathing space to decisions of state judges in criminal trials—protecting the public safety—applies with equal force to the decisions of most public officials. Moreover, when the decision at issue is that of a state official, the same concerns about federalism and comity apply in both contexts.

1. Lay public officials and state-court judges are similar in two respects that are relevant here. First, the policy rationale for allowing their decisions a measure of breathing space is essentially the same. In both cases, to be sure, there is a need

to protect against "the plainly incompetent [and] those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity); *Calderon* v. *Coleman*, 525 U.S. 141, 146 (1998) (habeas "protects the State's sovereign interest in punishing offenders and its good-faith attempts to honor constitutional rights, while ensuring that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged") (internal quotations omitted). However, in both cases, "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974) (qualified immunity), *limited on other grounds*, *Harlow*, 457 U.S. at 818; *accord (Michael) Williams* v. *Taylor*, 529 U.S. 420, 436 (2000) (observing the need to "safeguard the States' interest in the integrity of their criminal and collateral proceedings" and in "finality") (habeas).

And in both cases, the law assumes that, although these officials "may err[,] . . . . it is better to risk some error and possible injury from such error" than to allow their decisions to be routinely second-guessed. *Scheuer*, 416 U.S. at 242 (qualified immunity); *accord Williams*, 529 U.S. at 406 (noting that habeas review should not reach "run-of-the-mill state-court decision[s] applying the correct legal rule from our cases"). Thus, in both cases, the law seeks to provide a measure of deterrence against patent violations, while avoiding the kind of over-deterrence that would hamper effective decision-making by competent officers acting in a reasonable manner.

Second, public officials and state-court judges share a common challenge in determining the scope of federal rights in particular "situation[s]." *Saucier*, 121 S. Ct. at 2156. Some constitutional or statutory provisions may seem clear on their face, but raise thorny issues in some applications. For example, the Thirteenth Amendment's prohibition on "involuntary servitude" seems facially clear and may be easy to apply in most circumstances, such as the unlikely scenario

in which a social welfare worker wonders if he can sell the children in his charge into slavery. See *United States* v. *Lanier*, 520 U.S. 259, 271 (1997) ("The easiest cases don't even arise.") (internal quotation omitted). But it may be less than obvious whether that Amendment prohibits a police officer from ordering a minor in his custody (and who has not been convicted) to wash police vehicles without pay. See *Buchanan* v. *City of Bolivar*, 99 F.3d 1352, 1358 (6th Cir. 1996) (upholding qualified immunity in such a circumstance).

Other constitutional and statutory provisions state broad guarantees—*e.g.*, the First Amendment's "freedom of speech," the Fifth and Fourteenth Amendments' "due process of law," the Ninth Amendment's protection for unenumerated "other" rights—that necessarily require case-by-case judicial interpretation. *Lanier*, 520 U.S. at 265 (observing that many constitutional and statutory protections "are, of course, themselves stated with some catholicity of phrasing"). The same is true of the Fourth Amendment's prohibition on "unreasonable" searches and seizures, the Sixth Amendment's "right to a speedy and public trial," and the Eighth Amendment's prohibition on requiring "excessive" bail or fines, or (as here) on inflicting "cruel and unusual" punishments.

These sorts of constitutional and statutory mandates do not, at least on their face, "delineate the range of forbidden conduct with particularity." *Id.* The precise limitations imposed by such provisions are thus difficult to discern because their application often requires legal judgments wedded to particular factual comparisons and contexts.

2. Although they face a common interpretive problem, lay officials and state judges are not equally well suited to the task. Lay officials typically have no formal legal training and are unfamiliar with the rigors of case analysis. Accordingly, they cannot fairly be "'expected to predict the future course of constitutional law.'" *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999) (quoting *Procunier* v. *Navarette*, 434 U.S. 555, 562

(1978)). Judges, by contrast, are well equipped to amass and analyze the pertinent universe of precedent and to discern whether and how the principles articulated there apply to the case at hand. Judges may rule incorrectly, but at least they have a fair chance of "predicting" how a reviewing court will rule.

Judges also typically have the advantage of determining the speed at which they analyze a matter and reach a decision. Most other public officials, by contrast, must make snap judgments in the shifting conditions of the field. See, *e.g.*, *Saucier*, 121 S. Ct. at 2158 ("'police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving'") (quoting *Graham* v. *Connor*, 490 U.S. 386, 397 (1989)); *Scheuer*, 416 U.S. at 246 (prison officials "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication" of responsibility); *Cleavinger* v. *Saxner*, 474 U.S. 193, 203 (1985) ("[t]he administration of a prison is a difficult undertaking at best"). Without proper immunity for reasonable *mis*interpretation, government actors would be in the untenable position of facing the burdens of litigation and the risk of liability for guessing incorrectly the proper construction of an abstract constitutional provision.

Given that lay and judicial officials face similar interpretive challenges and that the former are less well equipped to discern the right answer, it makes sense to grant lay officials at least as much leeway in construing case law as is given to state judges in the habeas context.

3. When the public official is also a state employee, another consideration comes into play. As this Court has noted in the habeas context, AEDPA, like such decisions as *Teague*, on which it was based, was "intended . . . to advance" principles of "comity . . . and federalism." *(Michael) Williams*, 529 U.S. at 436. Overturning a state criminal conviction on federal habeas review raises obvious issues of respect for the States as sovereigns in the federal

system. See *Duckworth* v. *Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring) (habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority"). Imposing personal liability on a state official raises similar issues. See, *e.g.*, *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 & n.5 (1993) (likening qualified immunity for individual state officers to the benefits afforded by the Eleventh Amendment to States).

For all these reasons, especially when the suit is against a state official, the standards applied in the qualified immunity context to determine when federal law is "clearly established" should give at least as much breathing space to public officials as state judges receive in the habeas context.

B. The Eleventh Circuit's Approach Is Consistent With This Principle, Is Otherwise Faithful To This Court's Qualified Immunity Decisions, And Provides A Workable, Flexible Standard.

The Eleventh Circuit's standard satisfies this principle because it is functionally identical to this Court's *Williams/Penry II* standard for determining when a state-court decision violates "clearly established" law in the habeas context. And, as the United States also recognizes, the Eleventh Circuit's standard is fully consistent with this Court's qualified-immunity decisions. See U.S. Br. 18.

1. As noted in *Williams*, "[t]he antiretroactivity rule recognized in *Teague*, which prohibits reliance on 'new rules,' is the functional equivalent of a statutory provision commanding exclusive reliance on 'clearly established law.'" 529 U.S. at 379 (Stevens, J., concurring). That opinion also noted that the *Teague* rule was the "conceptual twin" of the "clearly established law" inquiry in the qualified immunity context. *Id.* at 380 n.12. From these two propositions it follows that AEDPA's "clearly established law" provision, which codified *Teague*, is functionally equivalent to the

"clearly established law" requirement of the qualified immunity defense. Accordingly, it makes sense to look to this Court's interpretations of the former in giving content to the latter.[2]

As indicated above, under AEDPA a judge acts "'contrary to'" clearly established law when he "'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Penry II*, 532 U.S. at 792 (quoting *Williams*, 529 U.S. at 406). The concepts of "contrary to" and "materially indistinguishable," moreover, play key roles in both the AEDPA analysis and the qualified immunity inquiry.

As this Court has explained, "contrary to" as used in AEDPA is commonly understood to mean "'diametrically different,'" "'opposite in character or nature,'" or "'mutually opposed.'" *Williams*, 529 U.S. at 405 (quoting *Webster's Third New International Dictionary* 495 (1976)). This same concept is embodied in the Court's qualified immunity jurisprudence, which grants immunity where an officer did not "*violate*"—*i.e.*, act contrary to—"clearly established statutory or constitutional rights." *Harlow*, 457 U.S. at 818 (emphasis added); see also *Anderson*, 483 U.S. at 650 n.2 (Stevens, J., dissenting) (qualified immunity not applicable to conduct an officer "should have known was *contrary to* a constitutional norm") (emphasis added).

The formulation of "materially indistinguishable" is likewise common to both contexts. As the Court recently explained, officers are entitled to qualified immunity unless courts have determined that the "conduct" at issue "is a

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[2] Although Justice Stevens' opinion in *Williams* cautioned that AEDPA did not necessarily codify qualified immunity standards in the habeas statute, *see* 529 U.S. at 380 n.12, that conclusion casts no doubt on the utility of looking to this Court's interpretation of AEDPA's "clearly established" requirement for guidance in interpreting that standard's "conceptual twin" in the qualified immunity context. *Id.*

constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier*, 121 S. Ct. at 2157. But to say that the facts of one case are "not distinguishable in a fair way" from the facts of another case is to say that the two cases are "materially indistinguishable." Thus, the standard already adopted by the Court in the qualified immunity context is linguistically and logically equivalent to this Court's understanding of the standard under AEDPA.

Accordingly, to determine whether a given precedent is "materially" distinguishable from the circumstances presented (either to the state court in the habeas context or to the government officer in the qualified immunity context), the proper question is whether the facts and procedural circumstances "on the basis of which the precedent was decided," *Green* v. *French*, 143 F.3d 865, 870 (4th Cir. 1998), are present in the subsequent circumstance. If something the precedent-setting court found important to its holding is missing in the present scenario, that case is incapable of making it "clear to a reasonable officer that his conduct [is] unlawful in the situation he confront[s]." *Saucier*, 121 S. Ct. at 2156.

But that is the essence of the Eleventh Circuit's "materially similar" approach. Except in the unusual circumstance that the application of federal law to a given circumstance is "obvious," the Eleventh Circuit asks whether any authoritative case has applied the legal principle in question to "materially similar" facts. Pet. App. 13 (internal quotation omitted). By definition, this standard does not require *all* of the facts in the precedent to be identical to those in the instant case. To the contrary, only those facts "material" to the alleged precedent need be the same.

If one or more of those facts is different, however, it is fair to say that the "material dissimilarities" between the two cases make the cases "distinguishable" from each other. Conversely, a case that is "materially similar" to another case

is also "materially indistinguishable" from that case. Thus, the Eleventh Circuit's standard is in reality the same standard that this Court applies in the habeas context.[3]

2. Like the *Williams/Penry II* rule in the habeas context, the Eleventh Circuit's standard represents a sensible and workable approach to qualified immunity issues. See generally Resp. Br. 32-39. This is so for several reasons.

First, it gives the public official fair warning of his or her legal responsibility. The requirement of "similarity" to past cases encourages the official to pay attention to the case law, either directly or through a legal officer. And, as respondents point out, the "requirement of 'materiality' fine-tunes the necessary element of similarity to ensure that the warning is 'fair' without requiring the sort of precise factual identity that would render Section 1983 meaningless." *Id.* at 33-34. It thus "answers the question 'how much similarity is required' from the perspective of the public official, pegging the degree of similarity required to the ability of the 'reasonable official' to detect that similarity in the immediate circumstances with which he or she is presented." *Id.* at 34.

Second, like the *Williams/Penry II* standard, the Eleventh Circuit's standard provides enough deterrence to prevent egregious violations. And it does so without imperiling public officials' ability and incentive to "act swiftly and firmly" when necessary. *Scheuer*, 416 U.S. at 246.

Penry II is instructive on this point. There, the Court rejected a defendant's contention that the Court's closest-fitting Fifth Amendment self-incrimination case, *Estelle* v. *Smith*, 451 U.S. 454 (1981), was materially indistinguishable

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[3] If anything, moreover, the slight difference in terminology makes sense considering the primary audience to which each standard is addressed. While judges may be more accustomed to "distinguishing" case law, it may be more meaningful to ask laymen to think in terms of "material similarities."

from his case. 532 U.S. at 794. Although *Estelle* and petitioner's case shared certain similarities—both involved the question of whether the accused should have been warned of his Fifth Amendment privilege against self-incrimination in the context of a psychiatric examination that was later admitted at trial—the Court held, based on "several" "substantial" factual and procedural differences, that the state court's decision was not "contrary to" *Estelle*. Thus, by applying the "materially indistinguishable" standard, the Court was able to avoid over-deterrence in the use of psychiatric examinations. At the same time, by overturning another ruling in the same case (on a jury instruction question), the majority made clear that this standard is by no means toothless. See *id.* at 803-04.

Third, because of the linguistic similarity to the *Williams/Penry II* standard, adoption of the Eleventh Circuit's standard (whether phrased in terms of "materially similar" or "materially indistinguishable") would allow courts to look to the habeas context for guidance in determining whether a particular right or principle is "clearly established" in the case law. This would further facilitate the education of public officials as well as the courts that must review their actions.

C. The Approaches Advanced By Petitioner And His *Amici* Would Give Prison Guards And Other State Employees Far Less "Breathing Space" Than State Judges Receive On Federal Habeas Review, And Would Violate This Court's Qualified Immunity Decisions.

By contrast, the approach advocated by petitioner and the ACLU—holding state officials responsible for amorphous "universal, unchallenged norms or understandings," ACLU Br. 6—would contravene the settled rule that federal law must make it "clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier*, 121 S. Ct. at 2156 (emphasis added). Such an approach also would create the anomalous result that ordinary state employees,

such as the defendant corrections officers in this case, would be expected to be more adept at construing federal legal precedents than are state court judges.

Petitioner repeatedly invokes "fair warning" as the appropriate standard for determining whether a prison official should be entitled to qualified immunity. The problem with that approach is not the words themselves, taken, as they are, from this Court's opinion in *Lanier*, but the way in which petitioner suggests they should be applied. In effect, petitioner attempts to move the focus away from a careful analysis of pre-existing law "in the situation [the officer] confronted," *Saucier*, 121 S. Ct. at 2156, and towards a more abstract, subjective, and malleable post-*hoc* evaluation of "fairness." Under this conception, petitioner focuses on whether state officials have properly "exercis[ed] judgment" or accurately "appl[ied] familiar legal principles to new situations." Pet. Br. 15. Indeed, the ACLU suggests that state officials should be subject to personal liability unless they correctly "deduce, extrapolate, . . . analogize . . . [and] employ constitutional common sense." ACLU Br. 17.

These kinds of subjective, abstract evaluations foster the very uncertainty that this Court's precedents are designed to reduce. State officials should not be charged with knowledge of constitutional principles unless they are either facially obvious or have been considered and applied in a meaningful—and materially similar—context. To hold state officials open to suit and personal liability based on law that is less clear than this would be anything but "fair."

Although petitioner and the ACLU purport to rely on decisions of this Court, their approaches are inconsistent with this Court's qualified immunity decisions. For example, in *Anderson*, as shown above, this Court held that the existence of generalized legal principles did not suffice to strip an officer of qualified immunity. 483 U.S. at 639. For personal liability to attach, the law requires a "more particularized" showing: namely, that "unlawfulness" under the Constitution

be "apparent" based on preexisting law. *Id.* at 640; *accord Saucier*, 121 S. Ct. at 2156. Thus, there is much more to the "fair[ness]" component of "fair notice" than the briefs of petitioner and the ACLU would suggest. The Eleventh Circuit's standard provides precisely the amount of "fair notice" that this Court's decisions require.

II. VIEWED IN LIGHT OF SETTLED SUMMARY JUDGMENT PRINCIPLES AS WELL AS ALL CONTROLLING LEGAL AUTHORITY, RESPONDENTS' ACTIONS DID NOT VIOLATE "CLEARLY ESTABLISHED" CONSTITUTIONAL RIGHTS.

Once the legal standard for establishing a "clearly established" right is determined, the next question is whether the allegations that must be taken as true at the summary judgment stage constitute a deprivation of any "clearly established" right. Petitioner and his *amici* attempt to strip the respondents of qualified immunity not only because they attached him to the prison restraining bar, but on the basis of other collateral events. And they argue that the unlawfulness of these actions was "clearly established," largely on the basis of a single, 1974 decision of the Fifth Circuit, *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir. 1974).

But their arguments ignore settled legal principles that apply to all claims of qualified immunity, and which are dispositive here regardless of the precise standard for determining when case law "clearly establishes" a constitutional right. First, like any other public official, the three guards who are respondents here can be held liable only for their *own* actions, as established by reasonable inferences from the record evidence. See Fed. R. Civ. P. 56(e). As shown below, the only challenged conduct fairly attributable to these guards, based on the summary judgment record, is that they either placed petitioner on the restraining bar or ordered him placed there. Second, like any other public official, respondents were entitled to consider subsequent legal developments—including prison regulations and

subsequently decided cases—in determining whether the 1974 decision on which petitioner relies "clearly established" the unlawfulness of their actions.

A. A Public Official Can Be Denied Qualified Immunity Only On The Basis Of His Own Actions, As Established By Reasonable Inferences From The Evidence.

In analyzing the summary judgment record in this case, petitioner and his *amici* make two fundamental errors. They incorrectly assume that actions taken by other prison guards can be attributed to the respondents. And they incorrectly assume that petitioner is entitled to the benefit of all conceivable inferences, regardless of whether those inferences are reasonable. Once those misperceptions are cleared away, it is apparent that these respondents can be held liable, if at all, only for the bare act of handcuffing petitioner to the restraining bar.

1. This Court's precedents make clear that no state official can be held liable for the actions of another state official under Section 1983 absent evidence of a conspiracy. A party may be liable under Section 1983 only if he, under color of state law, "subjects, or causes to be subjected" any citizen to a deprivation of federal rights. 42 U.S.C. § 1983. In the municipal liability context, the Court repeatedly has held that Section 1983's causation requirement precludes vicarious liability.[4] Indeed, "[g]iven the importance, under § 1983, of

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[4] *See Board of County Comm'rs* v. *Brown*, 520 U.S. 397, 403 (1997); *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989) ("*Respondeat superior* or vicarious liability will not attach under § 1983.") (citing *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978)); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 122 (1988) ("vicarious liability [for policymakers] would be incompatible with the causation requirement set out on the face of § 1983") (citing *Monell*, 436 U.S. at 691); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 479 (1986) ("§ 1983 could not be interpreted to incorporate doctrines of vicarious liability") (citing *Monell*, 436 U.S. at 692-94).

distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation." *City of Springfield* v. *Kibbe*, 480 U.S. 257, 267 (1987) (per curiam).

Vicarious liability is equally unavailable in suits against individual employees. In this context as well, "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of *his* actions.'" *Malley* v. *Briggs*, 475 U.S. 335, 345 n.7 (1986) (quoting *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961)) (emphasis added).

These principles are well illustrated in Justice Ginsburg's concurrence in *Saucier* v. *Katz*. 121 S. Ct. 2151, 2161 (2001). In that case, there was some question as to whether the plaintiff had been shoved by one officer, named Parker, or by Parker as well as Saucier. Justice Ginsburg's analysis, not disputed by the majority opinion, made clear that Saucier could not be held vicariously liable for anything Parker had done. She found it dispositive that, "at no point did [plaintiff] say, specifically, that Saucier himself, and not only Parker, pushed or shoved." *Id.* at 2161.

2. As Justice Ginsburg's concurrence in *Saucier* also makes clear, ordinary summary judgment principles apply with as much force in the qualified immunity context as in any other civil case. See *id.* & n.2. In analyzing any summary judgment record, the non-moving party is not entitled to every conceivable favorable inference from the record. Rather, the non-moving party is entitled only to the benefit of *reasonable* inferences. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986); see also *Hunt* v. *Cromartie*, 526 U.S. 541, 552 (1999) ("'all *justifiable* inferences are to be drawn in [the nonmovant's] favor'") (emphasis added) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Accordingly, "speculative inferences from unrelated evidence" cannot

serve as the basis for denying summary judgment. *Hanrahan* v. *Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., dissenting) (observing that "[t]he prospect of defending such lawsuits can hardly fail to dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties") (internal quotation omitted), *quoted with approval in Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982).

The federal rules, moreover, require that, "[w]hen a motion for summary judgment is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth *specific facts* showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). This requirement further constrains the range of inferences that can be drawn to defeat a summary judgment motion.

3. As set out more fully in the respondents' brief, petitioner cites two incidents as a potential basis for liability in this case. In one incident, which occurred on May 11, 1995, petitioner was handcuffed to a restraining bar for fighting with and threatening another inmate. On June 7, 1995, petitioner again was placed on the restraining bar for disrupting the work crew. Resp. Br. 3-9. Interpreted in the light most favorable to petitioner, but including only reasonable inferences, the record shows that the following actions are the only ones that can be attributed to each individual defendant:

Officer McClaran: Petitioner alleges that on May 11, Officer McClaran broke up a verbal disagreement and ordered petitioner put on the restraining bar for being "'disruptive to the work squad.'" JA 9 & 44. McClaran's own affidavit states that he "place[d] Inmate Hope on the Restraining Bar," although his affidavit does not specify the date. *Id.* at 24. There is no other evidence specifically linking McClaran to any of the events on June 7.

Sergeant Pelzer: Petitioner claims that Sergeant Pelzer actually placed him on the restraining bar on May 11. See *id.*

at 45. On June 7, Sergeant Pelzer is alleged only to have "place[d] leg irons on Inmate Hope and escort[ed] him to the security vehicle for transport to Limestone Correctional Facility." *Id.* at 23. There are no allegations, let alone evidence in the record, otherwise linking Sergeant Pelzer to the June 7 incidents.

Lieutenant Gates: Petitioner alleges that on June 7, Lieutenant Jim Gates cuffed petitioner to the restraining bar. See *id.* at 46. No evidence specifically links him to any other conduct on June 7.

Based upon the record, it is not reasonable to infer, and indeed it is implausible to suggest, that any of the respondents was involved on June 7 after petitioner was placed on the restraining bar. The record, in fact, clearly suggests that officers *other* than the named respondents were responsible for any conduct subsequent to petitioner's placement on the bar. When identifying these three respondents, petitioner is clear as to which actions are attributable to them.[5] In contrast, when making additional allegations of more egregious conduct, petitioner phrases his allegations in more general terms: he "was deprived of water and was teased by *two officers*"; "*they* started to bring me water but ended up giving my water to some dogs"; he "was teased by *officers*"; "*[t]he guards*" made him take off his shirt and left him in the sun for seven hours; and "*a guard*" taunted him about his thirst. JA 10-11 & 47 (emphasis added). Because petitioner's own affidavits attribute certain specific acts but not others to these three respondents, and the record shows that *other* officers were involved in much of the other conduct, it is only

[5] *See* JA 9 ("Officer McClaran . . . . ordered me put on the hitching post for being 'disruptive to the work squad.'"); *id.* at 44 ("Defendant Gene McClaran . . . ordered that I be placed on the hitching post because he claimed that I was being 'disruptive to the work squad'"); *id.* at 45 ("the officer who actually put me on the hitching post was Defendant Sergeant Mark Pelzer"); *id.* at 46 ("The officer who actually cuffed me to the hitching post on June 7 was Defendant Gates.").

reasonable to assume that, when the affidavit speaks of "guards" or "officials" in general terms, it refers to people other than the named petitioners here.

Accordingly, under settled summary judgment standards, the record does not afford any reasonable inference that any respondent denied water to the plaintiff, prevented him from using the bathroom, took his shirt away, or left him on the restraining bar after a request to return to work. The inferences that the Eleventh Circuit, petitioner and his *amici* draw on these matters are simply unreasonable to the extent they attempt to attribute specific actions—other than attaching petitioner to the bar in compliance with Regulation 429—to these three defendants. See U.S. Br. 21 & 24; Pet. Br. 4-5; ACLU Br. 1-2; Pet. App. 2-3, 6.[6]

B. Any Determination Of Whether A Particular Case "Clearly Establishes" A Constitutional Right Must Take Account Of Other Pertinent Authority, Including Both Regulations And Case Law.

Relying principally on the Fifth Circuit's 1974 decision in *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir. 1974), petitioner and his *amici* argue that, in 1995, petitioner had a "clearly established" constitutional right not to be attached to a

[6] The Court is of course not bound by the Eleventh Circuit's analysis of the record. First, a lower federal court's analysis of a summary judgment record is always subject to *de novo* review on appeal. *E.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 860 (1996) (plurality); *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992). Second and more generally, this Court can uphold the lower court's judgment on any ground supported by the record. *E.g.*, *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted."); *Langnes* v. *Green*, 282 U.S. 531, 536-37 (1931) ("the entire record is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have done upon the writ of error sued out for the review of the [district] court").

restraining bar (or any other fixed device), even as a means of inducing him to return to work in a cooperative spirit. These arguments, however, are based on two incorrect legal premises. First, they assume that a facially valid regulation—in this case Alabama's Regulation 429—is entitled to no weight in determining whether the law was "clearly established" in 1995. Second, these arguments ignore the fact that what is "clearly established" by the case law can (and often does) change over time. Once these erroneous assumptions are swept away, it is apparent that, even if *Gates* could be read to "clearly establish" a general right not to be attached to a restraining bar (and it cannot be read so broadly), no such right was "clearly established" at the time of the events at issue here.

1. As this Court recently held, the existence of a binding, state-wide policy is "important" in determining whether a practice sanctioned by that regulation violates "clearly established" constitutional rights. *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999) (officer's reliance on Marshals Service policy that "explicitly contemplated" the challenged conduct was "important to our conclusion" that qualified immunity was warranted). That is because public officials such as those in this case cannot be expected to be "seers in the crystal ball of constitutional doctrine." *Westberry* v. *Fisher*, 309 F. Supp. 12, 17 (D. Me. 1970). Moreover, such officers operate in a dangerous environment and must enforce a wide range of prison policies and regulations designed to protect them as well as inmates and prison staff.

Similar considerations explain why police officers are afforded greater latitude when they are acting in accordance with a statute or regulation, even if the law or regulation they enforce is later determined to be unconstitutional. As this Court held in *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967), a police officer will be "excus[ed] . . . from liability for acting under a statute that he reasonably believe[s] to be valid but that [is] later held unconstitutional." Indeed, *Pierson* and

cases following it create a presumption that an official acting in accordance with a law or regulation will be excused from personal liability for that action.[7] Although this protection is not absolute, personal liability is possible only when officials enforce a law or regulation that is "patently violative of fundamental constitutional principles." *Grossman* v. *City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994).

Such a presumption makes sense in this context as well. Prison guards and other state officials cannot be expected to stop and evaluate each policy they are called to enforce in light of current case law. *Accord Ort* v. *White*, 813 F.2d 318, 322 (11th Cir. 1987) ("Faced with . . . sudden wrongful and quite possible harmful conduct, the prison official on the scene does not have the luxury of hindsight and reflection."). And imposing such a requirement would put corrections officers in an impossible bind: they risk the safety of inmates and staff and perhaps their jobs if they fail to enforce prison regulations, but they risk personal liability if they fail correctly to divine the constitutional validity of the countless regulations they must enforce each day. See *Pierson*, 386 U.S. at 555 (policeman should not be forced to "choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does").

Neither petitioner nor his *amici* address this fundamental point. Yet any fair evaluation of what should have been "clearly established . . . [to] a reasonable person" standing in

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[7] *See, e.g., Dittman* v. *California*, 191 F.3d 1020, 1027 (9th Cir. 1999) ("when a public official acts in reliance on a duly enacted statute or ordinance, that official ordinarily is entitled to immunity"), *cert. denied*, 530 U.S. 1261 (2000); *Ireland* v. *Tunis*, 113 F.3d 1435, 1448 n.11 (6th Cir. 1997) (observing that a defendant "would be entitled to rely on longstanding practice . . . to establish the reasonableness of seeking a warrant"); *Shaw* v. *Stroud*, 13 F.3d 791, 801 (4th Cir. 1994) ("We have held that officers are entitled to qualified immunity when they rely on standard operating procedures.").

the defendants' shoes, *Harlow*, 457 U.S. at 818, must take into account that the officers were merely enforcing a presumptively valid regulation. Indeed, Regulation 429 states that an inmate who refuses to work or otherwise disrupts a prison work squad "*will* be handcuffed to the restraining bar." JA 103 (emphasis added). The officers were entitled to rely on this regulation's presumptive validity in carrying out their responsibilities.

2. Even if respondents were not entitled to rely on Regulation 429's presumptive validity, the totality of the binding authority in 1995 would not indicate to a reasonable officer that cuffing a prisoner to a restraining bar for a limited time, under a regulation that also provides for water, food, bathroom breaks, and release whenever the prisoner agrees to return peacefully to work, violated clearly established federal law.

Although Petitioner and his *amici* make much of the Fifth Circuit's 1974 *Gates* decision, *Gates* is not nearly as clear as petitioner makes it seem.[8] Moreover, as *Wilson* makes clear, whether official action is entitled to immunity depends on "the legal rules that were clearly established *at the time it is was taken*." 526 U.S. at 614 (internal quotation omitted) (emphasis added). Thus, even if the mere act of attaching a

[8] To be sure, *Gates* included "handcuffing inmates to the fence and to cells for long periods of time" in a laundry list of "innumerable instances of physical brutality and abuse." 501 F.2d at 1306. However, when read in context, the decision cannot reasonably be said to establish a bright line rule sufficient to put public officials on notice that the Eighth Amendment proscribes the use of restraining bars or similar devices, especially when used to induce an inmate to return to work in a more cooperative spirit. As the federal district court put it in *Fountain* v. *Talley*, "[t]here is no blanket prohibition against the use of punishment such as the hitching post in *Gates* which would signal to the Commissioner of Corrections [let alone ordinary corrections officers] that the mere use of the hitching post would be a constitutional violation." 104 F. Supp. 2d 1345, 1354 (M.D. Ala. 2000), *aff'd*, 275 F.3d 57 (11th Cir. 2001) (unpublished table decision).

prisoner to a restraining bar could be seen as violating "clearly established law" in 1974, respondents are nonetheless entitled to qualified immunity because the case law on this point was, at a minimum, ambiguous by 1995, when the relevant acts occurred.

For example, the Eleventh Circuit's decision in *Ort*, 813 F.2d 318, which the United States contends "provided respondents [with] additional notice," U.S. Br. 22, actually supports the constitutionality of respondents' actions and the prison regulation under which they acted. *Ort* specifically endorsed "immediate coercive measures undertaken by a prison official, necessitated by a spontaneous violation of a prison rule or regulation." 813 F.2d at 322. More specifically, the court observed that "prison officers must . . . have the authority to use that amount of force *or those coercive measures* reasonably necessary to enforce an inmate's compliance with valid prison rules." *Id.* at 325 (emphasis added).

Moreover, the conduct at issue in *Ort*, which the court held permissible, was to deny an inmate water until he complied with the rules and did the work required of him. *Id.* Thus, even if *Gates* stood for the general rule that petitioner claims it does, *Ort* indicated an exception to that general rule, namely, that coercive measures can be used to induce inmates to conform with prison rules, as long as the prisoner is given the option of escaping the punishment as soon as he is willing to comply. That is exactly what Regulation 429 does.

Finally, in the years preceding the 1995 incident, at least six federal courts in Alabama considered whether the restraining bar, or a similar restraint, was constitutional and *all of them* found that it was.[9] Thus, even if the officers had carefully

[9] *See Ashby* v. *Dees*, No. CV-94-U-0605-NE (N.D. Ala. Dec. 27, 1994); *Vinson* v. *Thompson*, No. CV-94-A-268-N (M.D. Ala. Dec. 9, 1994); *Hollis* v. *Folsom*, No. CV-94-T-0052-N (M.D. Ala. Nov. 4, 1994); *Williamson* v. *Anderson*, No. CV-92-H-675-N (M.D. Ala. Aug. 19, 1993);

studied all the case law, the reasonable conclusion as of 1995 was that the restraining bar was constitutional, even if *Gates* could be read as having "clearly established" its unconstitutionality in 1974.

It was not until three years after the events at issue here—in 1998—that the Middle District of Alabama held that in some circumstances the restraining bar was unconstitutional. See *Austin* v. *Hopper*, 15 F. Supp. 2d 1210, 1260 (M.D. Ala. 1998). It would not be appropriate to expect lay state officers to anticipate what was not grasped by several contemporary federal courts—and to hold those officers personally liable for this lack of prescience. As this Court has held, it is simply "unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618.

Dale v. *Murphy*, No. CV-85-1091-H-S (S.D. Ala. Feb. 4, 1986); *Lane* v. *Findley*, No. CV-93-C-1741-S (N.D. Ala. Aug. 4, 1994); *see also Whitson* v. *Gillikin*, No. CV-93-H-1517-NE (N.D. Ala. 1994) (not reaching constitutional question and upholding qualified immunity).

CONCLUSION

For all these reasons and those in respondents' brief, the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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